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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

INOVA MANAGEMENT CO., et al., Plaintiffs and Respondents, v. HUNTINGTON REPRODUCTIVE CENTER MEDICAL GROUP et al., Defendants and Appellants.	B195365 (Los Angeles County Super. Ct. No. BC351667)

APPEAL from orders of the Superior Court of Los Angeles County. Judith C. Chirlin, Judge. Affirmed in part; reversed in part and remanded with directions.

Callahan & Blaine, Edward Susolik, Jill A. Thomas and Caroline A. Molloy for Defendants and Appellants Huntington Reproductive Center Medical Group, Jeff Nelson, Jeffrey Nelson D.O. Inc., Michael Feinman, Michael Feinman M.D. Inc., John Wilcox, John Wilcox M.D. Inc., Daniel A. Potter, Daniel A. Potter M.D. Inc., Jane L. Frederick, Jane L. Frederick M.D. Inc., Bradford A. Kolb and Bradford A. Kolb M.D. Inc.

Kirtland & Packard, Robert A. Muhlbach and Robert K. Friedl for Defendants and Appellants Lawrence Silver and Silver & Field, a Law Corporation.

Law Offices of Terence M. Sternberg and Terence M. Sternberg for Plaintiff and Respondent Inova Management Co. LLC.

Rutan & Tucker, David H. Hochner and Gerard M. Mooney Jr. for Plaintiff and Respondent Dr. Brian Acacio.

SUMMARY

A lawyer and his clients appeal from the trial court's orders denying their special motions to strike malicious prosecution claims as well as an invasion of privacy claim pursuant to Code of Civil Procedure section 425.16. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL SYNOPSIS

Huntington Reproductive Center Medical Group entered the practice of infertility medicine in Pasadena in 1988. In 2002, the doctors of the partnership, including Joel Batzofin, M.D., entered into an Amended Restated Partnership Agreement which included a non-competition provision (NCP). This NCP provided that, upon departure, a partner could either compete with HRC or demand a buyout. More specifically, HRC would compensate the departing partner "if and only if, for a period of five (5) years after the date of withdrawal, the withdrawing Partner and/or the Partner's shareholder/employee does not practice reproductive endocrinology and/or infertility medicine within the Counties of Los Angeles, Orange, Riverside, Ventura, or within any other counties in which the Partnership has an office, or within any other counties that are immediately adjacent to any counties in which the Partnership then has an office since all the Partners acknowledge and agree that patients for each Partnership office come from within the county in which the office is located and adjacent counties (all such counties

collectively referred to herein as the 'Partnership Practice Area'). If any provision of this Section 13.2(b) shall be deemed by a court or arbiter of competent jurisdiction to exceed the time or geographic limits or any other limitation imposed by California law, then such shall be replaced by a provision that is valid and enforceable and that comes closest to the intention of the invalid or unenforceable provision."

Represented by Lawrence Silver and his firm Silver & Field (Silver), Huntington Reproductive Center Medical Group and the doctors in that partnership (HRC) filed a complaint against Inova Management Company, LLC (Inova) and Dr. Brian Acacio as well as former HRC partner Joel Batzofin, M.D., and others who are not parties to this appeal (including Geoffrey Sher, M.D., and various offices of the Sher Institute of Reproductive Medicine (SIRM) as we will further discuss), alleging causes of action for (1) interference with and inducing a breach of contract, (2) injunctive relief and (3) unfair competition.[1] In November 2002, by unanimous vote of HRC's remaining partners, Batzofin was ousted from the partnership and sought payment for his interests. When Batzofin and HRC were unable to agree on the amount due Batzofin, the parties proceeded to arbitration and reached a settlement. The settlement agreement also required Batzofin to comply with the NCP provision.

According to the complaint in the underlying action, days after receiving his first payment of $428,511.50 under the settlement, Batzofin's counsel disclosed that Batzofin would be working for the Sher Institute for Reproductive Medicine in Las Vegas.[2] As counsel for HRC, Silver responded that joining the Sher Institute for Reproductive Medicine constituted a breach of the partnership and settlement agreements. Counsel for Inova, in turn, wrote Silver that SIRM was not a legal entity. Silver conducted his own investigation of SIRM's locations in California (including the Los Angeles office run by

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[1] Acacio was the medical director of the SIRM office in Los Angeles.

[2] Batzofin later opened a SIRM location in New York.

Acacio) as well as SIRM's marketing materials, publications and website and concluded that SIRM was a single entity owned and controlled by Dr. Geoffrey Sher.[3]

Inova and Acacio moved for summary judgment in the underlying action on the ground that there had been no violation of the NCP because SIRM was not a legal entity practicing within the prohibited counties under the NCP. In opposition, HRC (through Silver) asserted that the substance of the business, rather than its form, should control, and submitted extensive evidence which it argued demonstrated that SIRM advertised itself as a nationwide entity serving patients all over the world, that it advertised itself as a nationwide chain of Sher's clinics, and that it marketed itself as a single medical practice.

In granting summary judgment, the trial court (Hon. Jane Johnson) noted that while the defendants argued Batzofin only practiced in SIRM clinics in Las Vegas and New York and each clinic was a separate legal entity, Sher identified himself as the founder and medical director of SIRM, HRC's evidence appeared to imply that SIRM was a unified entity or at least represented itself as a unified entity and it was clear a potential patient viewing SIRM's materials or website might gain the impression that SIRM was one large entity. Ultimately, however, the trial court in the underlying action concluded that HRC's authorities, analogizing to antitrust law, alter ego theory, use of corporate structure to evade the law and the rest were all distinguishable.

Inova and Acacio then filed an action against HRC and Silver for malicious prosecution. Acacio also asserted a claim for invasion of privacy, relating to Silver's retention on HRC's behalf of investigators who visited and contacted Acacio's office, posed as infertility clients and even submitted to invasive procedures to this end. HRC

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[3] In connection with his investigation of SIRM-LA, he ultimately asserted that both Batzofin and Acacio saw Batzofin's patients at the LA location.

and Silver filed special motions to strike, and the trial court (Hon. Judith Chirlin) denied them both.[4]

HRC and Silver appeal.

DISCUSSION

I. Code of Civil Procedure Section 425.16.

A strategic lawsuit against public participation (SLAPP) "seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Code of Civil Procedure section 425.16, the "anti-SLAPP" statute, was enacted as "a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Id.* at pp. 1055-1056.) In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action "arises from protected activity." (*Id.* at p. 1056.) "'A cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' . . ." (*Ibid.*, citation omitted.)

II. Inova's and Acacio's Malicious Prosecution Claims.

Acts in furtherance of free speech or petition rights include "communicative conduct such as the filing, funding, and prosecution of a civil action. . . . This includes qualifying acts committed by attorneys in representing clients in litigation." (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056, citations omitted.) As Inova's and Acacio's malicious prosecution causes of action arise from Silver's filing of the underlying action on behalf of HRC, the threshold showing of protected activity is satisfied.

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[4] Silver challenged both Inova's and Acacio's malicious prosecution claims and Acacio's invasion of privacy claim. HRC limited its special motion to strike to Inova's and Acacio's malicious prosecution causes of action.

"[O]nce the defendant establishes the challenged cause of action . . . arise[s] out of the exercise of petition or free expression rights, the burden shifts to the plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. . . . The Supreme Court has defined the probability of prevailing burden as follows: '[T]he plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 537, citations and further internal quotations omitted.) In reviewing an order granting or denying a special motion to strike under Code of Civil Procedure section 425.16, "we use our independent judgment to determine whether the defendant was engaged in a protected activity and the plaintiff has sustained his or her burden of prevailing on the challenged cause of action." (*Ibid.*)

"A malicious prosecution claim requires that the plaintiff 'demonstrate "that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor . . . ; (2) was brought without probable cause . . . ; and (3) was initiated with malice . . . ."'" (*Paulus v. Bob Lynch Ford, Inc. (Paulus)* (2006) 139 Cal.App.4th 659, 673, citations omitted.) Here, there is no dispute that the prior action terminated in Inova's and Acacio's favor with the order granting summary judgment; we conclude, however, that Inova and Acacio failed to meet their burden of proof as to the remaining elements of their malicious prosecution causes of action.

"[S]o that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim," our Supreme Court has enunciated a definition of the probable cause element it has characterized as a "'rather lenient standard for bringing a civil action.'" (*Paulus, supra,* 139 Cal.App.4th at p. 674, citation omitted.) Accordingly, probable cause will be found where "'any reasonable attorney would have thought the claim tenable.'" (*Ibid.*, citation omitted.) Resolution of this question "'requires a sensitive evaluation of legal principles and precedents'" and a "'court must properly take into account the evolutionary potential

of legal principles.'" (*Ibid.*) In assessing whether an attorney lacked probable cause to file or maintain a lawsuit, the standard is whether the action is so deficient that all reasonable lawyers would agree that the action lacked merit. (*Jarrow Formulas, Inc. v. La Marche* (*Jarrow Formulas)* (2003) 31 Cal.4th 728, 743, fn. 13.)

In this case, under the terms of the NCP, each doctor had a choice of either competing and foregoing goodwill distribution as a result *or* refraining from accepting employment with a competing "entity" for the proscribed period and therefore receiving the goodwill buyout. Just by its two-pronged nature, the NCP provision is at least arguably susceptible to the interpretation that working for an "entity" practicing within surrounding counties constitutes a violation, i.e., a partner cannot compete by practicing in surrounding counties *and* a partner cannot compete by going to work for an entity that practices in surrounding counties—even if he or she does not practice there—suggesting this sort of situation was contemplated as a violation as HRC contended. The thrust of HRC's complaint was that Batzofin, who insisted on the NCP's breadth, was attempting to have it both ways and Inova and Acacio were proper parties to the interference and unfair competition claims as a result. Given the fact that the NCP did not define "entity," the evidence that the parties' intent was to preclude conduct such as Batzofin's and the liberal standard applicable, including the broad scope of the unfair competition law, we conclude that Inova and Acacio failed to establish HRC's action (filed by Silver on HRC's behalf) was not a suit that "*all* reasonable lawyers agree totally lacked merit." (*Paulus, supra,* 139 Cal.App.4th at p. 684, fn. 22, citing *Jarrow Formulas, supra,* 31 Cal.4th at p. 743, fn. 13.)

Moreover, with respect to the element of malice, "Malice means actual ill will or some improper purpose whether express or implied." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465.) "Zealous representation sometimes requires an attorney to go out on a limb, to be innovative and creative in fashioning theories of liability or defense. Accordingly, an attorney needs only a reasonable and honest belief in the viability of each theory and the evidence supporting that theory, not a conviction his client will prevail, to justify filing a claim or defense." (*Id.* at pp. 1467-1468, citation omitted.)

"We accommodate these competing values by requiring the plaintiff in a malicious prosecution action to bear the heavy burden of proving malice in fact. . . . Any lesser standard would discourage attorneys from using their best efforts and, more dangerously, discourage individuals from availing themselves of the courts." (*Id.* at p. 1468, citation omitted.) Inova's and Acacio's challenges to the adequacy of Silver's legal theory on behalf of HRC, and their insistence that they provided Silver with evidence to undermine this theory, do not rise to the level of establishing the element of malice.

III. Acacio's Invasion of Privacy Cause of Action.

Again, when a special motion to strike is filed, the trial court must first assess whether the moving party has satisfied "the initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant's actions in the furtherance of the rights of petition or free speech." (*Hutton v. Hafif, supra,* 150 Cal.App.4th at p. 537.)

"The courts have struggled to refine the boundaries of a cause of action that arises from protected activity. In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 . . . (*Cotati*), the court explained that 'the statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether *the plaintiff's cause of action itself was based on an act in furtherance of* the defendant's right of petition or free speech.' . . . In *Navellier* [*v. Sletten* (2002) 29 Cal.4th 82, 92], the court cautioned that the 'anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.'. . ." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187.)

Acacio alleged Silver and HRC hired private investigators in an effort to uncover wrongdoing by Acacio. At Silver's and HRC's direction, the investigators pretended to be patients seeking assistance in becoming pregnant and gained access to his offices to

conduct their surreptitious investigation. Further, one of the HRC defendants provided a sperm sample which one of the investigators (posing as an infertility patient) transmitted to Acacio, representing it was her husband's. According to the allegations of the complaint, in violation of Penal Code section 630 et seq., the investigators taped voicemail messages and videotaped examinations and testing.

Pursuant to subdivision (e) of section 425.16, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or *any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest*." (Italics added.)

Given Acacio's allegations, we must determine whether the conduct described satisfies subdivision (e)(4) of section 425.16. We conclude that it does not. While protections afforded by the anti-SLAPP statute and the litigation privilege "are not entirely coextensive," the litigation privilege "informs interpretation of the 'arising from' prong of the anti-SLAPP statute." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 770, citation omitted.) In the context of the litigation privilege of Civil Code section 47, subdivision (b), acts deemed noncommunicative and therefore unprivileged include the prelitigation illegal recording of confidential telephone conversations and eavesdropping on telephone conversations. (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1058.) Accordingly, by application, we conclude that Silver failed to meet his burden to establish that Acacio's invasion of privacy claim arose from Silver's acts in furtherance

of his right of petition or free speech in connection with a public issue or an issue of public interest.[5] (Code of Civ. Proc., § 425.16, subd. (e)(4).)

DISPOSITION

The orders are affirmed as to Acacio's invasion of privacy claim and reversed as to Inova's and Acacio's malicious prosecution causes of action. The matter is remanded to the trial court with directions to enter a new and different order granting HRC's and Silver's special motions to strike the malicious prosecution causes of action but denying Silver's special motion to strike Acacio's invasion of privacy claim. HRC is entitled to its attorneys' fees as well as its costs of appeal from Inova and Acacio. (*Dove Audio v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; Code Civ. Proc., § 425.16, subd. (c).) As to Silver's appeal, Silver is entitled to attorneys' fees and costs of appeal from Inova; Silver is also entitled to attorneys' fees and costs from Acacio in connection with Acacio's malicious prosecution claim; Acacio and Silver are to bear their own costs of appeal relating to Acacio's invasion of privacy claim. (*ComputerXPress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020-1021; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA Inc.* (2005) 129 Cal.App.4th 1228, 1267.)

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WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**

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[5] HRC did not challenge Acacio's invasion of privacy claim in its special motion to strike.